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KATZ AND DOGS: CANINE SNIFF INSPECTIONS AND THE FOURTH AMENDMENT

The canine nose, used by school officials and law enforcement officers to detect the presence of contraband on persons or in closed containers such as suitcases, lockers, and cars is becoming an increasingly frequent intruder in the lives of Americans.¹ Judicial analysis of whether this practice constitutes a search within the meaning of the fourth amendment² has important implications for search and seizure law, particularly if the reasoning of these cases is extended to other information-gathering techniques which technology has given and will soon give to law enforcement agencies. Moreover, a recent United States Supreme Court decision on the subject³ further highlights its importance. This note examines the question of whether canine sniff inspections are searches under the fourth amendment through critical examination of the federal appellate and Supreme Court jurisprudence on the subject and then by argument that canine sniff inspections should be within the ambit of the fourth amendment.

Extant Sniff Law

Virtually all of the dog-sniff cases fall neatly into two categories. The first category, represented by a significant majority of the reported cases, consists of canine inspections of luggage, purses, or packages of travellers (usually air travellers) triggered by a match between the behavior of the suspect and some sort of "drug courier profile."⁴ The dog's indication

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1. The writer's search has revealed nearly two hundred such cases in courts of record. Obviously, this number greatly understates the frequency of dog-sniff investigations.

2. U.S. CONST. amend. IV.

3. *United States v. Place*, 103 S. Ct. 2637 (1983).

4. A drug courier profile is "an informally compiled abstract of characteristics thought typical of persons carrying illicit drugs." *United States v. Mendenhall*, 446 U.S. 544, 547 n.1 (1980).

Drug couriers more often than not can be expected to display several of the following "primary" characteristics:

- (1) arrival from or departure to an identified source city;
- (2) carrying little or no luggage or large quantities of empty suitcases;
- (3) unusual itinerary, such as rapid turnaround time for a very lengthy airplane trip;
- (4) use of an alias;
- (5) carrying unusually large amounts of currency in the many thousands of dollars usually on their person, in briefcases or bags;
- (6) purchasing airline tickets with a large amount of small denomination currency; and
- (7) unusual nervousness beyond that ordinarily exhibited by passengers.

... In addition, drug runners often will display several of the following "secondary" characteristics:

- (1) The almost exclusive use of public transportation, particularly taxicabs, in departing from the airport;

that the package contains contraband, called an "alert," usually serves as probable cause for a search or arrest warrant. The second category includes three distinguishable uses of canines in the schools: indiscriminate inspections ("dragnet sniffs") of unattended lockers and cars; dragnet sniffs of persons, purses, and other items closely associated with the person; and inspections of particular students or items based on an individualized suspicion directed toward that student or item. For purposes of convenience, these two broad categories will be referred to as "airport sniffs" and "school sniffs."

Airport Sniffs

The federal circuits are divided on the question of whether airport sniffs constitute fourth amendment intrusions. However, there is a distinct majority view, explicitly adopted by the Second, Fourth, Fifth, Seventh, and Tenth Circuits, that an airport sniff is simply not a search.

The Second Circuit held in *United States v. Waltzer*⁵ that an alert by a trained drug-detecting dog with an excellent record for accuracy constituted probable cause for a warrantless arrest of the defendant. The opinion expressly states that a canine sniff is neither a search nor a seizure for fourth amendment purposes.⁶ The defendant's conformity with a drug courier profile at the departure terminal in Ft. Lauderdale prompted the investigations which led to the sniff of the defendant's luggage upon his arrival at Kennedy International Airport.⁷

Under very similar facts, the Fourth Circuit held in *United States v. Sullivan*⁸ that a sniff of luggage entrusted to an airline does not invade any reasonable expectation of privacy and is not a search,⁹ and this view still appears to be the law of the Fourth Circuit.¹⁰

In *United States v. Goldstein*,¹¹ the Fifth Circuit, confronted with

(2) Immediately making a telephone call after deplaning;

(3) Leaving a fictitious telephone number with the airline; and

(4) Excessive travel to source or distribution cities.

United States v. Waksal, 709 F.2d 653, 655 n.2 (11th Cir. 1983).

5. 682 F.2d 370 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 3543 (1983).

6. *Id.* at 373.

7. *Id.* at 371.

8. 625 F.2d 9 (4th Cir. 1980), *cert. denied*, 450 U.S. 923 (1981) (held that partial alert to defendant's suitcases by one trained narcotics-detecting dog and a full alert by another when combined with behavior of defendant in a manner typical of drug couriers is sufficient probable cause to support a warrant to search the luggage).

9. *Id.* at 13.

10. See *United States v. Robinson*, 707 F.2d 811 (4th Cir. 1983) (holding that an alert by a trained narcotics-detecting canine to a "suspicious looking" package is sufficient probable cause for a warrantless search of the package).

11. 635 F.2d 356 (5th Cir.), *cert. denied*, 452 U.S. 962 (1981) (defendant's conformity with drug courier profile at Orlando International Airport induced Drug Enforcement Ad-

facts much like those in *Waltzer*, stated clearly that a canine sniff is not a search.¹² Four months later, the court extended *Goldstein* to allow agents to "prep" a bag by squeezing it to force air from its interior thereby giving the dog a better sample of air to sniff.¹³

United States v. Lewis,¹⁴ a case much like the other airport cases, indicates that the Sixth Circuit adheres to the majority view, as does *United States v. Klein*¹⁵ for the Seventh Circuit. However, the *Klein* court expressly avoided deciding whether an "indiscriminate, dragnet-type sniffing operation" is a search.¹⁶ Nevertheless, as the scope of an activity is relevant only as to its reasonableness once it has been characterized as a search,¹⁷ this statement is inconsistent with the opinion's blanket exclusion of dog sniffs from fourth amendment scrutiny.

Faced with a typical airport sniff fact pattern, the Tenth Circuit in *United States v. McCranie*¹⁸ states flatly that "[t]he use of a sniffing dog is not a search or a seizure."¹⁹ This statement is a retreat from that circuit's position in *United States v. MacDonald*,²⁰ which held that a dog sniff is not an *unreasonable* search when police reasonably suspect criminal activity.²¹ The clear implication of *MacDonald* is that a sniff does invoke the fourth amendment. Despite its retreat from *MacDonald*, the *McCranie*

ministration agents to subject his luggage to a sniff inspection; the defendant was arrested when he refused to consent to a full search of his luggage after the dog alerted).

12. *Id.* at 360-61.

13. *United States v. Viera*, 644 F.2d 509, 511 (5th Cir.), *cert. denied*, 454 U.S. 867 (1981) (bus driver's observation that bus passenger's luggage appeared to contain drugs prompted Drug Enforcement Administration agents to subject luggage to sniff inspection; held that dog's alert plus driver's observation is sufficient probable cause to obtain warrant to search the luggage).

14. 708 F.2d 1078 (6th Cir. 1983) (defendant's suspicious behavior prompted two sniffs of his luggage, one at Miami Airport which produced a mild alert and one in Detroit which produced a strong alert; the alerts provided sufficient probable cause for a warrant to search defendant's luggage; the court expressly held that the sniffs did not constitute searches).

15. 626 F.2d 22 (7th Cir. 1980) (defendants' suspicious behavior led agents to detain and question them; when agents determined that one defendant was traveling under an assumed name and that both had lied to the agents, they subjected the luggage to a sniff inspection; the dog's positive reaction supplied probable cause for a warrant to search the luggage).

16. *Id.* at 27.

17. *Horton v. Goose Creek Indep. School Dist.*, 690 F.2d 470, 476 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 3536 (1983).

18. 703 F.2d 1213 (10th Cir. 1983) (defendant's suspicious behavior at departure airport induced a sniff of his luggage at arrival airport; dog's positive reaction was sufficient probable cause for a warrant to search the luggage).

19. *Id.* at 1218.

20. 670 F.2d 910 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 373 (1983) (defendant's nervous behavior on board airliner aroused suspicions of his seatmate who happened to be a Drug Enforcement Administration agent; on arrival and after other suspicious behavior was noted, defendant was questioned and patted down and his luggage subjected to a sniff inspection; dog's alert led to procurement of a search warrant and a search of the bag).

21. *Id.* at 914.

court still declares that "authorities must have some suspicion luggage contains contraband before it can be sniffed."²² However, if a sniff is not a search, it should be subject to no restrictions as to reasonableness, and there is no valid constitutional basis for subjecting it to a suspicion requirement.²³ Apparently, the courts are finding that the sniffs are not searches because those sniffs have tended to be fairly reasonable. However, the courts' blanket pronouncements may serve to trap appellate courts and lower courts which are bound by their decisions into intolerable results when confronted with sniffs conducted under more objectionable circumstances.

Two circuits have considered cases which invited discussion of whether a dog sniff is a search but, nevertheless, have failed to make an unambiguous pronouncement on the subject. In 1976, the First Circuit held in *United States v. Race*²⁴ that an alert by a trained drug-detecting dog constituted probable cause to arrest defendant.²⁵ This holding seems to imply that a sniff is not a search requiring probable cause or some other constitutional justification. Nevertheless, the opinion never explicitly states that a canine sniff inspection does not invoke the fourth amendment.

In a sniff of bus terminal lockers based on circumstances which would probably constitute reasonable suspicion, the District of Columbia Circuit, in *United States v. Fulero*,²⁶ held the conduct of the police in conducting the sniff to be "reasonable" and dismissed any constitutional questions about the inspection with the laconic declaration that "[w]e think the argument is frivolous."²⁷

Alone among the circuits,²⁸ the Ninth Circuit has adopted the minority view that a dog sniff is a search. In *United States v. Beale*,²⁹ a dog was

22. 703 F.2d at 1218. For this proposition the court cites *United States v. Waltzer*, 682 F.2d 370, 372-73 (2d Cir. 1982). The writer finds no support in *Waltzer* for requiring a suspicion of any kind before luggage can be sniffed; in fact, the opinion's broad statement on the cited pages that a canine sniff is not a search or a seizure under the fourth amendment is inconsistent with such a requirement. For further discussion of *Waltzer*, see *supra* notes 5-7 and accompanying text.

23. *Horton v. Goose Creek Indep. School Dist.*, 690 F.2d 470, 476 (5th Cir. 1982).

24. 529 F.2d 12 (1st Cir. 1976) (dragnet sniff of airline warehouse resulted in alert to two crates; agent inserted a knife into one of the crates and detected the smell of marijuana on the blade; defendant consented to a search of the crates when confronted with the sniff results after he had loaded the crates into his automobile).

25. *Id.* at 14.

26. 498 F.2d 748 (D.C. Cir. 1974) (two footlockers which smelled strongly of mothballs and which were being shipped by bus from Yuma, Arizona, a known drug distribution center, were subjected to a dog sniff; the dog's alert provided probable cause to obtain a search warrant for the trunks).

27. *Id.* at 749.

28. Neither the Third Circuit nor the Eighth Circuit appears to have considered the issue.

29. 674 F.2d 1327 (9th Cir. 1982), *cert. granted, vacated and remanded*, 103 S. Ct. 3529 (1983) (consider further in light of *United States v. Place*, 103 S. Ct. 2637 (1983)).

used to sniff the luggage of an airline passenger whose behavior comported with a drug courier profile, and the animal's alert was used to obtain a search warrant for the bag. The court, in unequivocal language supported by cogent reasoning, held that a dog-sniff inspection is a fourth amendment intrusion, "albeit a limited one . . . which may be based on an officer's 'founded' or 'articulable' suspicion rather than probable cause."³⁰ The court considered the facts of the prior cases from the other circuits rather than merely what they purport to hold, and found that virtually all of the sniffs in these cases had been supported by some sort of suspicion, usually a drug courier profile.³¹ The court apparently felt that its holding was in accord with what the other circuits had done, if not with what they had said.

School Sniffs

Although school sniffs have not generated as many reported cases as have airport sniffs, the general problem of the application of the fourth amendment to the schools and the more specific problem of the constitutionality of canine sniffs in schools have produced a prodigious amount of law review commentary.³² The complex issue of the applicability of the Bill of Rights to school children is outside the scope of this analysis. Instead, the fourth amendment will be assumed applicable in its full rigor to the schools.

As stated earlier, school sniffs can be divided into three distinct fact patterns: dragnet sniffs of cars and lockers; dragnet sniffs of persons, purses, and other items closely associated with the person; and sniffs of particular persons or items based on some sort of particularized suspicion directed at that person or item. No cases which consider the last category have been found.

30. *Id.* at 1335.

31. *Id.* at 1335 nn.15-16. It should be emphasized that this observation applies only to *reported* cases. Because of wide prosecutorial discretion as to which cases to bring to trial and the understandable tendency of prosecutors to pursue only their strongest cases, these cases do not necessarily reflect law enforcement practice in this respect.

32. Gardner, *Sniffing for Drugs in the Classroom—Perspectives on Fourth Amendment Scope*, 74 NW. U.L. REV. 803 (1980); Trosch, Williams & Devore, *Public School Searches and the Fourth Amendment*, 11 J. L. & Educ. 41 (1982); Comment, *Searches by Drug Detection Dogs in Pennsylvania Public Schools: A Constitutional Analysis*, 85 DICK. L. REV. 143 (1980); Comment, *Search and Seizure in the Public Schools: Are Our Children's Rights Going to the Dogs?*, 24 ST. LOUIS U.L.J. 119 (1979) [hereinafter cited as Comment, *Search and Seizure*]; Note, *Fourth Amendment—Searches—Use of Canine to Detect Drug Paraphernalia on School Children Is an Unreasonable Search Under the Fourth Amendment*. *Jones v. Latexo Independent School District*, 499 F. Supp. 223 (E.D. Tex. 1980), 9 AM. J. CRIM. L. 127 (1981); Note, *Public School Searches and Seizures*, 45 FORDHAM L. REV. 202 (1976); Note, *The Constitutionality of Canine Searches in the Classroom*, 71 J. CRIM. L. & CRIMINOLOGY 39 (1980) [hereinafter cited as Note, *Canine Searches*]; Note, *Dog Searches in Schoolrooms—State or Private Action?*, 15 VAL. U.L. REV. 137 (1980).

Two federal circuits have considered the issue of dragnet sniffs of cars and lockers. Not surprisingly, they have arrived at different results. In fact, the Fifth Circuit decided the issue and then quickly reversed itself in the same case, *Horton v. Goose Creek Independent School District. Horton I*³³ attempts to analyze the dog sniff problem logically rather than by mere citation of cases. Judge Wisdom, writing for the court, declared that "the intrusion on the cars and lockers . . . must be recognized as a search governed by the fourth amendment."³⁴ However, this rule did not long remain the law of the Fifth Circuit. On petition for rehearing, *Horton II*³⁵ was issued five months later. In *Horton II*, the same panel found *Goldstein*³⁶ to be controlling on the issue of whether the dragnet sniffs of student lockers and cars were searches and thus held that these canine inspections did not invoke the fourth amendment.³⁷

The Tenth Circuit gave the problem a cursory examination in *Zamora v. Pomeroy*,³⁸ in which it held that the joint control exercised by the school and a student over a locker, and the duty of school officials to police the school, justified a sniff search of the locker once the probability existed that it contained contraband.³⁹ Without saying so explicitly, the case clearly stands for the proposition that a dog sniff of lockers is a search, but a limited one which requires only reasonable cause or reasonable suspicion.⁴⁰

Sniffs of students' persons have likewise provoked division among the circuits. In the Fifth Circuit, the otherwise dissonant *Horton* opinions are in harmony on the issue, holding sniffs of persons to be searches permissible only when there is an individualized suspicion.⁴¹ *Horton II*, however, explicitly declines to decide whether a sniff of a person from some distance away constitutes a search.⁴² The Tenth Circuit in *Zamora*

33. 677 F.2d 471 (5th Cir. 1982). Plaintiff sued under 42 U.S.C. § 1983, which provides:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

34. 677 F.2d at 480.

35. 690 F.2d 470 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 3536 (1983).

36. 635 F.2d 356 (5th Cir.), *cert. denied*, 452 U.S. 962 (1981); *see supra* note 11 and accompanying text.

37. 690 F.2d at 477.

38. 639 F.2d 662 (10th Cir. 1981) (dragnet sniff of high school lockers; dog alerted to Zamora's locker which was subjected to a warrantless search; plaintiff sued under 42 U.S.C. § 1983, quoted *supra* note 33).

39. *Id.* at 670-71.

40. *Id.* at 670.

41. *Horton I*, 677 F.2d at 485; *Horton II*, 690 F.2d at 479.

42. 690 F.2d at 479.

similarly requires that sniffs of persons be supported by a reasonable cause or reasonable suspicion.⁴³

In the controversial case of *Doe v. Renfrow*,⁴⁴ the Seventh Circuit held that a dragnet sniff of all students in a school did not violate a student's fourth amendment rights such that a student had a cause of action under 42 U.S.C. §§ 1983⁴⁵ and 1985.⁴⁶ This result has been vehemently denounced in strong dissents at every stage of the case's appellate consideration⁴⁷ and in sharply critical law review commentary.⁴⁸ The facts of this case are particularly capable of producing outrage. A dog "alerted" to a thirteen-year-old girl in a dragnet sniff of junior high school students in their classrooms. When the dog continued to alert after the girl had emptied her pockets, she was subjected to a brief nude search in the school's nurse's station. Neither inspection of the contents of the child's pockets nor the nude search revealed the presence of contraband. The dog's reaction was probably caused by the scent of the child's own dog, which was in heat and with which she had played that morning before she came to school.⁴⁹ Although the sniff did not give rise to a cause of action, the nude search did, and Miss Doe was granted relief.⁵⁰

Recent Developments

The United States Supreme Court addressed the dog-sniff problem this past summer in *United States v. Place*.⁵¹ *Place* is a typical airport sniff case, including the officers' reliance on a drug courier profile, except

43. 639 F.2d at 670.

44. 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981).

45. *Supra* note 33.

46. 42 U.S.C. § 1985(3) provides in pertinent part:

[I]f two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

47. 631 F.2d at 93 (Swygert, J., dissenting); 635 F.2d at 582 (Swygert, J., dissenting from denial of petition for rehearing); Chief Judge Fairchild and Circuit Judges Wood and Cuhady also dissented in both instances; 451 U.S. at 1022 (Brennan, J., dissenting from denial of certiorari).

48. Comment, *Search and Seizure*, *supra* note 32, at 131-34; Note, *Canine Searches*, *supra* note 32, at 42-45.

49. *Doe v. Renfrow*, 475 F. Supp. 1012, 1017 (N.D. Ind. 1979).

50. 631 F.2d at 92-93.

51. 103 S. Ct. 2637 (1983).

for the fact that Place's luggage was held against his will for ninety minutes before it was subjected to the highly-trained nose of "Honey."⁵² The Court held that the ninety-minute detention which preceded the sniff was an unreasonable seizure under the fourth amendment.⁵³ This holding clearly would have sufficed to reverse Place's conviction. Nevertheless, Justice O'Connor, writing for a seven member majority, addressed herself to the issues raised by the sniff of the luggage. Justice O'Connor writes that "exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a 'search' within the meaning of the Fourth Amendment."⁵⁴ But for other rather expansive language in the several sentences which precede the quoted passages, this rather limited language might be construed as illustrating the Court's intent to limit its reasoning to the limited factual context before it. However, the Court discusses the particularly unobtrusive nature of dog sniffs and concludes that the technique is *sui generis*⁵⁵ and that it is "aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure."⁵⁶ This section of the opinion is clearly dictum and is, therefore, of questionable authority. Its authority is further minimized by the significant fact that the issue of whether a canine sniff is a search was neither briefed nor argued by the parties.⁵⁷

These brief paragraphs of dictum also fail to resolve several of the problems surrounding canine sniffs, particularly the issue of whether even the broadest and most indiscriminate of sniffs would invoke the fourth amendment, *e.g.*, a sniff of all passengers leaving an airplane or of all persons entering an auditorium for a rock concert. Nevertheless, the Court apparently intends lower courts to be guided by these pronouncements.⁵⁸

Such intention notwithstanding, when the Ninth Circuit reconsidered its *Beale* opinion on remand from the Supreme Court, it did not retreat from the beleaguered minority view that a canine sniff invokes the fourth amendment. The opinion ingeniously evades the intent of the *Place* dictum by interpreting it to mean that "no *additional* suspicion is required to justify exposing luggage to a trained canine once a founded or articulable suspicion has been established."⁵⁹ The court then restated some of the reasoning underlying its earlier holding, resolutely adhering to its

52. *Id.* at 2640.

53. *Id.* at 2645-46.

54. *Id.* at 2645.

55. *Id.* at 2644.

56. *Id.*

57. *Id.* at 2653 (Blackmun, J., concurring).

58. *United States v. Beale*, 103 S. Ct. 3529 (1983) (remanded for further consideration in light of *Place*).

59. *United States v. Beale*, No. 80-1652, slip op. at 5124 (9th Cir. Oct. 24, 1983) (emphasis added).

reasoning, and remanded the case to the district court for a determination of whether the sniff was supported by some articulable suspicion.⁶⁰

Katz and Dogs

*Katz v. United States*⁶¹ revolutionized fourth amendment analysis when, scarcely three pages into the opinion, it declared that “[i]n the first place, the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase ‘constitutionally protected area.’ ”⁶² And, of course, *Katz*’s declaration that “the Fourth Amendment protects people, not places”⁶³ is familiar to every criminal procedure student. In *Katz*, the Court was confronted with a warrantless recording of petitioner’s end of telephone conversations by microphones placed on top of but not penetrating the telephone booths used by *Katz* in his bookmaking enterprise.⁶⁴ The Supreme Court repudiated its former analysis, embodied in *Olmstead v. United States*,⁶⁵ which had held that, absent a physical penetration of a constitutionally protected area, no search takes place.⁶⁶

The crux of *Katz* and its seminal contribution to modern fourth amendment analysis is its abandonment of *Olmstead*’s emphasis on physical intrusion and trespass in favor of the test embodied in the concurring opinion of Justice Harlan that for an intrusion to be a search “a person [must] have exhibited an actual (subjective) expectation of privacy and . . . the expectation of privacy [must] be one that society is prepared to recognize as ‘reasonable.’ ”⁶⁷ This test is often condensed into the rubric “reasonable expectation of privacy.”⁶⁸

In order to determine the theoretical soundness of those cases which hold that a sniff is not a search, their reasoning must be examined in light of general fourth amendment doctrine. In any such analysis, one should bear in mind that:

The decision to characterize an action as a search is in essence a conclusion about whether the fourth amendment applies at all. If an activity is not a search or seizure (assuming the activity does not violate some other constitutional or statutory provision), then the government enjoys a virtual carte blanche to do as it pleases.⁶⁹

One can abstract from the decisions two basic rationales for holding a

60. *Id.* at 5125-26.

61. 389 U.S. 347 (1967).

62. *Id.* at 350.

63. *Id.* at 351.

64. *Katz v. United States*, 369 F.2d 130 (9th Cir. 1966).

65. 277 U.S. 438 (1928).

66. *Id.* at 457, 464, 466.

67. 389 U.S. at 361 (Harlan, J., concurring).

68. *United States v. Goldstein*, 635 F.2d 356, 361 (5th Cir. 1981).

69. *Horton II*, 690 F.2d at 476.

canine sniff not to be a search. The first of these is the argument employed in *Place* that a sniff is *sui generis* and a uniquely unobtrusive type of investigation. A canine inspection, it is argued, does not require opening of the luggage, does not expose noncontraband items, discloses only the presence or absence of a contraband item, and causes little inconvenience or embarrassment.⁷⁰ In other words, the intrusion resulting from a dog sniff is so slight that it should not be considered a search.

The second rationale is that a sniff of something (usually luggage) is not an inspection of that object at all. Instead, it is argued that the dog is sniffing the air around the object and that since the area is accessible to the public one does not have a reasonable expectation of privacy in the airspace surrounding the object.⁷¹ Therefore, because a police officer who has a right to be where he is and who smells contraband has not conducted a search,⁷² a dog sniff is not a search. The dog's nose is allowed in the place of the officer's nose either because a sniff by a dog is no different from a sniff by an officer,⁷³ or because the dog's sense of smell is just like a flashlight in that it merely enhances the sensory capabilities of the officer.⁷⁴

It is respectfully submitted that the reasoning of these cases is seriously flawed and should be abandoned. The weaknesses of *Place* as authority have already been noted. It should be recalled that neither party briefed nor argued the dog-sniff issue. As the concurring opinion observed, the Court "should not decide an issue on which neither party has expressed any opinion at all. The Court [was] certainly in no position to consider all the ramifications of this important issue."⁷⁵

The main vulnerability of the "sniff is not a search" cases is that they constitute an abandonment of *Katz*. The first rationale, that a canine sniff is not a search because of its uniquely unobtrusive nature, clearly contradicts the principles of *Katz*. It should now be apparent that if an activity violates a person's reasonable expectation of privacy, it is a search, regardless of how unobtrusive the method. Obtrusiveness is a factor more properly considered in weighing the reasonableness of a search rather than in answering the threshold question of whether a search has taken place.

70. 103 S. Ct. at 2645; see also *United States v. Waltzer*, 682 F.2d 370, 373 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 3543 (1983); *United States v. Bronstein*, 521 F.2d 459, 462-63 (2d Cir. 1975).

71. *United States v. Lewis*, 708 F.2d 1078, 1080 (6th Cir. 1983); *United States v. Goldstein*, 635 F.2d 356, 361 (5th Cir.), *cert. denied*, 452 U.S. 962 (1981); *United States v. Venema*, 563 F.2d 1003, 1006 (10th Cir. 1977).

72. *United States v. Johnston*, 497 F.2d 387, 398 (9th Cir. 1974); *United States v. Martinez-Miramontes*, 494 F.2d 808, 810 (9th Cir.), *cert. denied*, 419 U.S. 897 (1974); *United States v. Halliday*, 487 F.2d 1215, 1217 (5th Cir. 1973).

73. *United States v. Goldstein*, 635 F.2d 356, 361 (5th Cir.), *cert. denied*, 452 U.S. 962 (1981); *United States v. Bronstein*, 521 F.2d 459, 462 (2d Cir. 1975).

74. *United States v. Bronstein*, 521 F.2d 459, 462 n.3, 463 (2d Cir. 1975).

75. 103 S. Ct. at 2653 (Blackmun, J., concurring).

The second rationale, that the sniff is of the airspace around the object and that one has no reasonable expectation of privacy in that airspace, misconstrues the reasonable expectation of privacy test and represents a retreat to the repudiated "protected areas" analysis of *Olmstead*, with its artificial concern for the place searched rather than the nature of the privacy interest invaded. The misanalysis in this second class of cases begins with faulty application of the public-view doctrine. It is well-settled law that what one exposes to public view⁷⁶ (or even to public smell)⁷⁷ is not protected by the fourth amendment. However, that is only true because the effect of exposing marijuana to public view through the windows of a vehicle,⁷⁸ or of allowing the strong smell of the drug to escape into the open air,⁷⁹ is to deprive anyone who bothers to think about the consequences of those actions of the expectation that these activities will remain private. The operative factor is the nature of the exposure, not the nature of the place from which the exposure can be detected.

The public-view doctrine should not be extended to mean that the mere escape of molecules from a suitcase deprives one of the fourth amendment's protection simply because the molecules are now in a public place and may be detected by an animal or a device more sensitive than the human nose. In the true public-view cases, the presence of a contraband substance has clearly been "knowingly revealed to the public."⁸⁰ However, in the case of an aroma too faint for detection by the human nose, nothing has been knowingly revealed to the public unless the public at large were suddenly to be equipped with highly-trained German shepherds; hence, the reasonable expectation of privacy is not defeated in any practical sense. Similarly, the escape of sound waves that only a microphone could detect from the "protected" interior of Mr. Katz's phone booth to the "unprotected" exterior did not serve to deprive him of the reasonable expectation that his conversation would remain private.⁸¹

Moreover, the extension of the plain-view doctrine to dog sniffs clearly violates the requirement imposed by the Supreme Court in *Coolidge v. New Hampshire* that the officer encounter the object inadvertently in order for the doctrine to apply.⁸² In the dog-sniff cases, the trained canines

76. *Katz*, 389 U.S. at 351 (1967).

77. *United States v. Goldstein*, 635 F.2d 356, 361 (5th Cir.), *cert. denied*, 452 U.S. 962 (1981); *United States v. Sullivan*, 625 F.2d 9, 13 (4th Cir. 1980), *cert. denied*, 450 U.S. 923 (1981).

78. *E.g.*, *United States v. Dorr*, 636 F.2d 117, 119, 121 (5th Cir. 1981) (narcotics agent spotted bales of marijuana through the window of a light plane while it was on the ground for refueling; agent's looking through the window held not to be a search).

79. *E.g.*, *United States v. Johns*, 707 F.2d 1093, 1096 (9th Cir. 1983) (officers detected the strong smell of marijuana emanating from trucks; the smell constituted probable cause for a search warrant, but did not justify an exigent search of the trucks).

80. *Katz*, 389 U.S. at 351.

81. Note, *Constitutional Limitations on the Use of Canines to Detect Crime*, 44 *FORDHAM L. REV.* 973, 986 (1976).

82. 403 U.S. 443, 469-71 (1970).

are almost always summoned to the scene to sniff particular objects for the presence of contraband when officers suspect that contraband will be found.

Furthermore, a dog's nose and an officer's nose are not indistinguishable, as some of these cases assert. If there were no difference between them, no rational law enforcement agency would invest the substantial resources necessary to acquire, train, and maintain the animals.⁸³ In fact, a dog's sense of smell is roughly eight times more sensitive than that of humans,⁸⁴ and these animals are not certified as trained drug-detecting dogs unless they are able to score a hundred percent in a battery of small tests.⁸⁵ These very differences between the human and canine nose should indicate that one's expectation of privacy in the odor is reasonable since only a dog can detect it.

Moreover, a dog is not like a flashlight in that it does not enhance the officer's senses; it replaces them.⁸⁶ Even if the dog did only enhance the officer's sense of smell, this enhancement may still infringe upon a protected privacy interest. If the enhancement allows detection of aromas not otherwise detectable by the human nose alone, it should invoke the fourth amendment if one applies by analogy the law applying to devices used to amplify sound.⁸⁷ Therefore, if the smell is perceivable only by a dog or by another instrumentality more sensitive than human senses, its escape into a public place should not serve to deprive the owner of the object being smelled of a reasonable expectation of privacy in its contents.⁸⁸ Indeed, one may take steps to prevent detection of odor by the intruding canine nose, thus exhibiting directly an intent to render the aroma private.⁸⁹

The second rationale, that a sniff of something is not an inspection of the object, also carries with it dangerous implications for search and seizure law. In these cases, the escape of a tenuous stream of cannabis molecules from a piece of luggage or a locker (a constitutionally protected area) into the surrounding public airspace (a non-protected area) subjects them to detection by a highly-sensitive canine nose without any protection from the fourth amendment. This reasoning would seem to imply that detection by means considerably more sensitive than unaided human perception of whatever characteristics of whatever activity in which

83. *Horton I*, 677 F.2d at 478.

84. *United States v. Beale*, 674 F.2d 1327, 1333 (9th Cir. 1982), *cert. granted, vacated and remanded*, 103 S. Ct. 3529 (1983).

85. Comment, *United States v. Solis: Have the Government's Supersniffers Come Down with a Case of Constitutional Nasal Congestion?*, 13 SAN DIEGO L. REV. 410, 418 (1976).

86. *United States v. Beale*, 674 F.2d 1327, 1334 (9th Cir. 1982).

87. *Horton I*, 677 F.2d at 478.

88. *Id.* at 478-79.

89. *United States v. Beale*, 674 F.2d 1327, 1334 (9th Cir. 1982).

one engages that escape into any publicly accessible place would not be classified as a search. The language and logic of the cases seem to impose no barrier to such an extension of reasoning. Indeed, the Court has shown some tendency to move in that very direction.⁹⁰

The judicial analysis of the issue of whether a dog sniff is a search is arguably illogical and inconsistent—both internally and with general fourth amendment law. It represents a dangerous erosion of what the courts consider to be reasonable expectations of privacy and, therefore, of the scope of the protections accorded by the fourth amendment.

Sniffs as Subsearches

The dangers and deficiencies of the majority view that a sniff is not a search can be avoided by the adoption of a position similar to that adhered to by the Ninth Circuit in *United States v. Beale*: A canine sniff is a limited fourth amendment intrusion which may be founded on something less than probable cause or a warrant.⁹¹ In fact, such a solution was suggested in 1976,⁹² years before the majority view developed.

An analogy to this approach in general fourth amendment law is found in *Terry v. Ohio*.⁹³ *Terry* recognizes that the fourth amendment is not violated by an intrusion that is not a "full-blown search,"⁹⁴ although not supported by a warrant or probable cause, as long as the intrusion is supported by "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."⁹⁵ Since a dog's sniff is considerably less intrusive than conventional means of searching for contraband and yet does intrude upon protected fourth amendment privacy interests, it may properly be considered a "subsearch" analogous to a *Terry*-stop.⁹⁶ Even though *Terry* is specifically directed to stops of suspicious persons, there is support in the jurisprudence for extension of the subsearch principles to objects as well.⁹⁷

Such an approach has several salutary effects. Placing sniffs under

90. *United States v. Knotts*, 103 S. Ct. 1081 (1983). In *Knotts* the Court held that the placement of beepers in several drums of chemicals sold to persons suspected of manufacturing illegal drugs did not invoke the fourth amendment. Justice Rehnquist, writing for the Court, commented that "[n]othing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case." *Id.* at 1086.

91. See *supra* text accompanying notes 29-31.

92. Peebles, *The Uninvited Canine Nose and the Right to Privacy: Some Thoughts on Katz and Dogs*, 11 GA. L. REV. 75, 95-104 (1976).

93. 392 U.S. 1 (1967).

94. *Id.* at 19.

95. *Id.* at 21.

96. See Peebles, *supra* note 92, at 95.

97. *United States v. Van Leeuwen*, 397 U.S. 249, 253 (1970); *United States v. Martell*, 654 F.2d 1356, 1358-59 (9th Cir. 1981).

the regulation of the fourth amendment allows judicial scrutiny of their reasonableness. Courts could consider the nature and scope of the sniff, the particularity of the suspicion which prompted it, the social interest being protected, and the privacy interest being infringed upon.⁹⁸ Courts would then be free to develop guidelines for regulating this activity, formulated in the laboratory of experience and based on the overriding requirement of reasonableness. This approach is also more realistic in that it recognizes the subjective sensation of being searched which most people probably experience upon being subjected to a sniff inspection, as well as the legitimate and significant law enforcement interests advanced by the use of this powerful drug-detecting tool.

Distinguishing full searches from subsearches would also be fertile ground for the development of judicial guidelines. Since allowing courts to make this distinction allows them to remedy abuse over a broader range of potentially invasive activities, thus strengthening the fourth amendment, such decisions are a far more appropriate arena for judicial discretion than is the initial determination of whether the fourth amendment is invoked at all.⁹⁹ This approach would not significantly impair airport sniffs because, as has already been observed, virtually all of the reported cases involve sniffs prompted by a drug courier profile or some other suspicious activity. These justifications should make the sniff a reasonable subsearch.¹⁰⁰ The broad standard of reasonableness should also be applied to school sniffs. Warrantless sniffs should generally be limited to instances where there is a demonstrable drug problem in the school and where suspicion is directed at an individual or a highly circumscribed group of individuals. "Dagnet sniffs" of persons should never be allowed except in the unlikely event that a warrant can be procured, while dagnet sniffs of cars and lockers should be limited to schools where the drug problem has reached crisis proportions and school officials have no other effective weapon at their disposal to protect the children from this menace to their physical and mental health.

Conclusion

Canine sniffing to detect contraband is an important and increasingly pervasive law enforcement practice which has spawned a large number of reported cases, most of which purport to hold that a dog sniff is not a search invoking the fourth amendment. Arguably, these cases are analytically flawed and inconsistent and constitute a dangerous erosion of the fourth amendment. Classification of dog sniffs as subsearches

98. See Peebles, *supra* note 92, at 95-96.

99. *Id.* at 86.

100. See *Florida v. Royer*, 103 S. Ct. 1319, 1326 (1983). But see *United States v. Hernandez-Cuartas*, 717 F.2d 552, 555 (11th Cir. 1983).

governed by the fourth amendment standard of reasonableness but exempt from warrant and probable cause requirements would allow needed judicial scrutiny while still giving law enforcement officials considerable latitude in sniffing out crime with the sensitive canine nose.

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